

REDACTED VERSION

1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS
2
3 SIERRA NEVADA CORPORATION,)
4 Plaintiff,)
5 vs.) Case No. 14-994C
6 THE UNITED STATES OF AMERICA,)
7 Defendant.)
8 -----)
9
10 ***TRANSCRIPT UNDER SEAL***
11
12 Courtroom 7
13 Howard T. Markey National Courts Building
14 717 Madison Place, N.W.
15 Washington, D.C.
16 Tuesday, October 21, 2014
17 2:30 p.m.
18 Bench Ruling
19
20 BEFORE: THE HONORABLE MARIAN BLANK HORN
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25 Susanne Bergling, RMR-CRR-CLR, Reporter

1 APPEARANCES:

2
3 ON BEHALF OF THE PLAINTIFF:

4 ROBERT S. METZGER, ESQ.

5 NEIL HALL O'DONNELL, ESQ.

6 Rogers Joseph O'Donnell, PC

7 750 Ninth Street, N.W.

8 Suite 710

9 Washington, D.C. 20001

10 (202) 777-8950

11 rmetzger@rjo.com

12 nodonnell@rjo.com

13
14 ON BEHALF OF THE DEFENDANT:

15 DANIEL HERZFELD, ESQ.

16 KIRK T. MANHARDT, ESQ.

17 U.S. Department of Justice

18 P.O. Box 480

19 Ben Franklin Station

20 Washington, D.C. 20044

21 (202) 616-0344

22 daniel.herzfeld@usdoj.gov

23

24

25

1 ON BEHALF OF THE DEFENDANT-INTERVENOR (BOEING):

2 SCOTT M. MCCALEB, ESQ.

3 JON W. BURD, ESQ.

4 SAMANTHA S. LEE, ESQ.

5 GARY S. WARD, ESQ.

6 Wiley Rein, LLP

7 1776 K Street, N.W.

8 Washington, D.C. 20006

9 (202) 719-3193

10 smccaleb@wileyrein.com

11

12

13 ON BEHALF OF THE DEFENDANT-INTERVENOR (SPACEX):

14 RICK VACURA, ESQ.

15 STEVEN W. CAVE, ESQ.

16 CATHERINE L. CHAPPLE, ESQ.

17 Morrison & Foerster, LLP

18 1650 Tysons Boulevard

19 Suite 400

20 McLean, Virginia 22102-3915

21 (703) 760-7729

22 rvacura@mofo.com

23

24

25

1 ALSO PRESENT:

2 KAREN REILLEY, ESQ., NASA

3 SCOTT W. BARBER, ESQ., NASA

4 WILLIAM GERSTENMAIER, ENGINEER, NASA

5 SUZETTE W. DERREVERE, ESQ., BOEING

6 PADRAIC B. FENNELLY, ESQ., BOEING

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1 P R O C E E D I N G S

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3 (Proceeding called to order, 2:41 p.m.)

4 THE COURT: Go ahead and be seated.

5 Okay. Let's figure out who's here and whether we
6 have an issue or not. We still have sealed the
7 courtroom. You all were supposed to let me know what
8 was sealed or not sealed. We haven't really gotten that
9 far. You were all on a pretty quick Chinese fire drill,
10 so I understand that, but I think we need to figure out
11 whether we continue to keep everything sealed.

12 As I said the last time, the assumption has to be
13 that -- and is -- that court proceedings are open unless
14 there's a justified reason for sealing individual items
15 or sealing the whole thing. There's not a lot in this
16 record that we've created so far that strikes me as
17 sealworthy. There may be a few statements that the
18 agency would prefer the international community not to
19 see. There may be some numbers. There may be various
20 issues, but, of course, we're not into the evaluation
21 here, so there isn't a lot.

22 I think we're going to have to go through that
23 exercise. I'd note, by the way, that I have no idea
24 why, now that we're under a protective order, some
25 documents were filed by the Government under seal and

1 still, nonetheless, redacted. That's an oxymoron
2 somehow.

3 MR. HERZFELD: I can explain it if you would
4 like, Your Honor.

5 THE COURT: I would. I'm curious.

6 MR. HERZFELD: I think it was part of the
7 negotiation among the parties that took a little longer.
8 It was determined that given the timeline of the GAO
9 protest, they wanted to kind of keep that walled off, so
10 the parties would deal with all the numbers when they
11 got to GAO, and we wanted to provide mainly the numbers
12 that were necessary dealing between now and when the
13 stay would end on January 5th, if GAO went to ruling.

14 So, that's why the numbers weren't provided.

15 THE COURT: So, I wasn't trustworthy.

16 MR. HERZFELD: No, it wasn't you, Your Honor. I
17 think it had to do with the parties in the GAO
18 proceeding.

19 THE COURT: I'm being facetious. You shouldn't
20 even have answered that. All right.

21 The next comment that I need to make,
22 Mr. Herzfeld, is, of course, directed at you, and it's
23 in order to share with all the parties what occurred. I
24 very, very deliberately gave everybody equal time to
25 respond, and the briefs, although certainly a very quick

1 turnaround, but given the nature of what we're dealing
2 with here on the override and the consequences as
3 alleged by the Protestor with taking more time each day
4 was represented as somewhat critical, but by both sides
5 for different reasons, and yet the Government did not
6 file in time and didn't even file within the time that
7 they said they were going to file when they didn't file
8 on time.

9 Now, we're in a government contracts arena. The
10 last time I checked, I've issued opinions, too, saying
11 late is late. That's not okay. We did not grant you an
12 extension, because to do that would have been unfair,
13 and when you indicated, well, we're going to need three
14 more hours, you didn't even make that. Now, granted, it
15 was only slightly over the three hours, but that's not
16 okay.

17 And I'm sure that your colleagues and the other
18 parts of your table and the opposing table would have
19 been quite happy to have three more hours, and certainly
20 some of the associates that were working on the cases at
21 the various firms would have definitely appreciated
22 that. You know, we managed to ruin everybody's weekend,
23 including mine and Mr. Matson's, but that's okay. What
24 is not okay is to self-take additional time, and I think
25 that's an important comment to make.

1 The consequences in this particular instance are
2 probably not terrible since we're dealing with a very
3 limited record, and I have had a chance to read
4 literally everything that was submitted on my own and to
5 come to conclusions as a result of it, and with the help
6 of the briefs that were filed, and I did read your
7 briefs. But that's not the way it should happen. So,
8 I'm not sure what the reason for that is.

9 I understand there are a lot of reviews and a lot
10 of coordinations, but everybody was working with the
11 same kind of problem, and in the case of the private
12 parties, with their clients. So, hopefully, we can not
13 see that again.

14 MR. HERZFELD: Your Honor, I do want to
15 apologize. I do -- it is -- I'm relatively new at the
16 Department of Justice, so getting integrated and
17 figuring things out, so that falls on my shoulders. I
18 want to apologize to the Court for that and will do
19 better in the future.

20 THE COURT: What's done is done. I don't look
21 backwards, I only look forwards, but I think it's only
22 fair that it be on the table.

23 All right. Let's get to what we're here to
24 figure out. The Protestor, Sierra Nevada Corporation,
25 filed a protest on a very limited basis in this kept

1 Court; namely, to have the Court review the override
2 decision. What today's proceeding concludes is not a
3 decision on the merits of the evaluation, not a decision
4 on the merits of the award, but merely a review of
5 whether or not the agency acted properly when they
6 overrode the automatic GAO stay upon filing of the case
7 at GAO.

8 Now, as I looked at the timetable, we have the
9 award of the contract on the 16th of September, 2014;
10 the protest to the GAO about 13 days later, on the 29th
11 of September; the override decision about ten days after
12 that on the 9th of October; and the filing in the Court
13 of Federal Claims six days thereafter on the 15th of
14 October, 2014. So, things have been moving relatively
15 rapidly.

16 The date that we looked for but couldn't quite
17 find was the debriefing date. When was that,
18 Mr. O'Donnell?

19 MR. O'DONNELL: It was, Your Honor, I believe
20 five days before the date of the -- of the protest.

21 THE COURT: Okay. All right. So, basically,
22 things moved relatively rapidly here on all sides. The
23 longest period of time occurred between the protest to
24 GAO and the override decision. If we're talking about a
25 debriefing date on the 21st and the protest to GAO on

1 the 29th, that was about a ten-day period between the
2 protest to GAO filing and the override decision by the
3 agency. But all in all, things have moved with
4 reasonable speed here.

5 So, we're not talking about, you know, major
6 delays that would change any of the date of valuations
7 that we would come up in terms of the time used, the ten
8 days between GAO protest and the override perhaps being
9 the longest period of time. And, again, coming out of
10 an agency practice and knowing how far up the chain of
11 command this probably had to go, ten days is a little
12 longer than you would like perhaps, but -- in order to
13 give everybody a fair chance to keep this thing moving,
14 but certainly not totally unreasonable. Given that,
15 there is no impact, then, on what we're about to do, I
16 think, from this schedule.

17 The contracts at issue, I think everybody
18 recognized -- and the Protestor even acknowledged during
19 the hearing we had last Friday -- that essentially this
20 is an important contract. There is some urgency to it.
21 Different evaluations by the Protestor, the awardees,
22 and the Government as to the impact of what the -- now
23 what are about 75 days left in the GAO time, if I'm
24 correct. The agency protest, Mr. Herzfeld, I think you
25 represented was due to the GAO on Friday. Is that

1 correct? Monday?

2 MR. HERZFELD: It's Monday.

3 THE COURT: Monday? Okay, my mistake. Monday.

4 And so at that time, certainly assuming that's the way
5 this goes, there's a much broader exchange of
6 information and the Protestor will have a great deal
7 more information at that point as well, but that's
8 directed at the merits of the protest with respect to
9 the evaluation, which is, of course, not what we're
10 doing here. It just then gives the Protestor more
11 information to decide how to proceed in the event that
12 the override were to be sustained.

13 So, where are we here on the override? The
14 agency met its requirements to give an override decision
15 in writing, and in accordance with, they chose, the
16 Reilly factors, which comes out of the case decided by
17 Judge Allegra, a 2006 case, so some age on it, but it
18 seems to be what all the parties here agreed was a good
19 starting point and what the agency and many other
20 agencies, for that matter, are using as the format for
21 their decision. And, of course, the GAO override
22 decision tracks the Reilly factors almost one for one.

23 The Reilly factors are whether there's
24 significant and adverse consequences which will
25 necessarily occur if the stay is not overridden; whether

1 reasonable alternatives to the overrides exist that
2 would adequately address the circumstances presented;
3 how the potential cost of proceeding with the override,
4 including the costs associated with the potential that
5 GAO might sustain the protest, compare to the benefits
6 associated with the approach being considered for
7 addressing the agency's needs; and, four, the impact of
8 the override on competition and integrity of the
9 procurement system.

10 We all recognize and both parties agreed at our
11 earlier hearing that even with this construct, it is a
12 very factually based decision on the particular facts
13 that are presented by the particular protest override
14 and underlying case that will direct how to decide on
15 whether the override meets the criteria to be sustained
16 or not.

17 The standard of review -- and I am summarizing
18 here so that you'll have an oral decision with which to
19 work, and we'll talk about what happens next in a
20 moment -- but basically the standards are the arbitrary,
21 capricious, abuse of discretion or not otherwise in
22 accordance with the law or without observance of
23 procedure required by law. It's the APA review
24 standards which have been found to apply to the override
25 situation, and the question becomes also whether or not

1 there's clear error here that would drive you to a
2 decision that the override decision was arbitrary,
3 capricious, an abuse of discretion, or otherwise not in
4 accordance with law or procedure.

5 It's very clear that using that standard of
6 arbitrary, capricious, et cetera, a reviewing court
7 should not substitute its judgment for that of the
8 agency but should review the basis for the agency
9 decision to determine if it was legally permissible,
10 reasonable, and supported by the facts. We have lots of
11 cases for that, obviously. I'm reading out of Motor
12 Vehicles Manufacturers Association vs. State Farm Mutual
13 Auto Insurance Company, issued by the Supreme Court.

14 There's really boilerplate law that we all use to
15 get to this point. That's the easy stuff. We're pretty
16 clear as to what the standards are, we're pretty clear
17 who bears the burden of proof -- namely the Plaintiff --
18 and we go forward from that point of view. And now we
19 get to talk about the facts in this case and how that
20 plays out.

21 The interesting thing about the Reilly case, of
22 course, is that after setting out the standards, that
23 case really doesn't elaborate on the standards a whole
24 lot, and the reason it doesn't, of course, is because in
25 Reilly, there were so many things that were not done

1 properly that it was very easy to sort of get to an end
2 result without having to go into the nuances of what
3 some of these standards implicate. There's some
4 suggestions about various things, but it's not a --
5 beyond setting out the standards, it's not going to help
6 us a whole lot, which leaves a lot of room for how we
7 interpret this.

8 There are some interesting facts in this case
9 that I think are pretty undisputed as to what is
10 happening here with the Space Program during the interim
11 time that there is no American capability, which there
12 is not at the moment. The Russians are providing the
13 capability under contract. The contract runs out at a
14 particular point in time which matches up the target
15 date for capability under the contracts at issue with
16 Boeing and SpaceX at the moment, and there is I think an
17 understanding on the part of everybody that the goals
18 are perhaps attainable but ambitious and subject to the
19 vagaries of life.

20 These are complex contracts. Everybody agrees
21 with that. The complexity also suggests that we can't
22 predict an absolute target date, although there are
23 contractual dates that, as we've sorted out, are in the
24 proposals by the contractors, who are currently SpaceX
25 and Boeing, and the hope, the goal, the current contract

1 suggests these 2017 dates are on the table but
2 ambitious, and ambitious does not, however, translate
3 into their not being realistic dates.

4 There is a definite difference between the
5 parties on the impact and the catastrophic or not
6 catastrophic nature of the impact. Both parties see a
7 very, very serious impact on their sides. And when I
8 say "both parties," I'm, of course, talking about the
9 Defendant and the Defendant-Intervenors whose interests
10 align here at least for purposes of the override, maybe
11 not always aligning with each other at the GAO, since we
12 did hear that the Government could terminate one and not
13 the other or terminate both and proceed, depending upon
14 when GAO decides, or not terminate anybody, which
15 obviously would be the Intervenors' hope. Right now,
16 your interests, I think, align pretty perfectly to
17 defending the override.

18 The Boeing briefs -- which were very helpful and
19 I appreciate that and I think very pointed -- that brief
20 argues, "This is the quintessence of mere disagreement
21 and judgment substitution, and the Intervenor has not
22 identified any clear error in NASA's findings or in the
23 exercise of its unique technical expertise, instead
24 offers its view as a substitute for NASA's reasoned
25 judgment, attempting to support its challenge with its

1 position that the automatic stay is the be-all and
2 end-all of CICA, regardless of the express provision for
3 the agency to exercise its discretion to override the
4 stay, as NASA has done here based on urgency and the
5 nation's best interests."

6 That fourth Reilly factor, which is, in part,
7 what this addresses, although it, of course, addresses
8 the first Reilly factor as well, and there is an
9 intersection, obviously, between the factors, and that's
10 part of why the Reilly factor is a good construct, but
11 it's not an end-all and be-all, because they are not all
12 separate; they are interdependent.

13 If I end up not substituting my own judgment, I
14 really have to find something that weighs so heavily in
15 the Protestor's favor on one of these or more of these
16 factors. Let's talk, therefore, about the first factor
17 and then we'll just go through them.

18 In the override decision, the United States
19 notes, "The delay in the availability of a certified
20 U.S. crew transportation system necessary for emergency
21 rescue capability as well as for planned crew rotations
22 jeopardizes the safety of the American and international
23 partners astronauts who serve on the International Space
24 Station." And I'm not necessarily reading sequentially;
25 I'm taking selections out here.

1 "Work must begin immediately on critical path
2 activities in order for the vehicles to reach the point
3 in the certification process where service missions can
4 be authorized and to complete the safety, certification,
5 and flight tests in time for missions to launch after
6 the override."

7 And on the certification and flight tests, I
8 would note that there are repeated references in the
9 NASA override decision to the fact that safety
10 certification of flight test standards are not the
11 standards of the companies involved but actually the
12 NASA standards, which may or may not be higher than the
13 company standards. I'm not implying that the companies
14 would fly an unsafe vehicle, but it is a level of
15 degree, or at least impliedly so, above and beyond
16 commercial certification, potentially.

17 "The override also notes that both Boeing and
18 SpaceX must complete their certifications baseline
19 review within 90 days of contract award, which then
20 becomes the framework for the certification approach for
21 the entire contract, including the baseline
22 certification plan, as well as verification and
23 validation plan that is traceable to NASA's
24 requirements.

25 "New space vehicle production is an inherently

1 high-risk enterprise with a high probability of delay."

2 And we've all acknowledged that. That works, of course,

3 in both sides' favor. The probability of delay here,

4 which NASA acknowledges, suggests -- if that were an

5 isolated issue, which it's not -- that 75 more days

6 shouldn't make a difference. So, we're really focused

7 on 75 more days, but the delay that could occur will not

8 necessarily occur, and the question is, do you stop

9 everything for those 75 days, assuming GAO is on time?

10 This is not an uncomplicated protest, so I know

11 they have 180 days to do it, but sometimes you get

12 extensions on that. And I'm not sure that this is the

13 case for it, I'd rather suspect not, but they do try

14 very often to send their cases in to a form of mediation

15 before they get to the final decisions. That would, of

16 course, delay it as well.

17 So, I don't know that there's a lot of room here

18 for a mediation, but -- I'm guessing there really is

19 not, but there are all kinds of probabilities that you

20 can hypothesize on. For instance, what will happen at

21 GAO is no different than hypothesizing about what will

22 happen anywhere else, and we really don't know that

23 there will be a delay, even though NASA acknowledges

24 that that's a possibility and experience tells you that

25 the larger the contract, the more likely there is some

1 kind of a probability of that, but it doesn't have to
2 happen.

3 And I think we have to assume that the
4 contractors are anticipating meeting their obligations,
5 that the agency is anticipating enforcing the
6 obligation, and that's the basis on which we have to
7 proceed. But it is a point that certainly makes us stop
8 and think about it with respect to the Protestor's
9 position as well as the agency position.

10 Right after saying that "New space vehicle
11 production is an inherently high-risk enterprise with a
12 high probability of delay," the agency continues -- and
13 this is back-to-back sentences -- "a further 100-day
14 delay" -- and, of course, now we know it's 75 at this
15 point -- "in the contract, especially when the critical
16 milestone setting the foundation for certification of
17 the vehicles is set to occur within the first 90
18 days" -- which is now less than that, too -- "will
19 result in a direct adverse impact on crucial contract
20 timeline. This delay also prevents obtaining long lead
21 items and requires workforce and subcontractor
22 stand-down, which will create a more than four-day delay
23 to restart and will impair the ability of the
24 contractors to meet NASA's needed mission dates.

25 "A massive effort will be necessary to expedite

1 activities after the resolution of the protest to meet
2 the 2017 schedule, which will be extremely difficult to
3 achieve, because the contractors cannot expedite the
4 acquisition and production of long lead items critical
5 to both mission operators' launch of the crew vehicle."

6 Here is where I think it is a difficult balance,
7 but even if there were to be delay, if you delay the
8 contract still further, you're almost guaranteeing that,
9 if not making it more likely, although not necessarily.
10 Maybe the contractors can double up and run up -- you
11 know, run together like hamsters in a little turn thing
12 and make it happen. But the question really for the
13 Court is, do we jeopardize that 2017 date even further
14 by rejecting the override?

15 The Protestor certainly questions a lot of things
16 in the override decision, and the one that is the most
17 viable for me, although I think the least critical,
18 frankly, in whether or not to overturn the override, is
19 this question of the Government has a position that
20 talks about how delay and the availability of the
21 contract in an operational forum would violate U.S. law,
22 specifically the Authorization Act of 2010, and would be
23 in violation of legally binding international
24 agreements.

25 The international agreements aside for a moment,

1 we're -- you know, the Government is now using
2 capability on the Soyuz -- to reach Soyuz from the
3 Russians. It takes a waiver, we all acknowledge that,
4 to utilize that capability. It may even take some long
5 lead time, and I think that's more of a problem,
6 frankly, but you have a waiver now.

7 The better part of that discussion, it seems to
8 me, in terms of why this is an urgent contract has more
9 to do with the vagaries of international diplomacy and
10 some of what's going on in the world right now. And
11 there's much more going on than any of us in this room
12 have any understanding of, I'm sure of that, having
13 sniffed around the international diplomacy world in
14 various jobs that I've had over the years. We don't
15 have any idea.

16 We do know from the popular press that our
17 relationship is not good. We do know that we have shut
18 down various things on behalf of our hosts who take us
19 to the Soyuz at this point, and we do know that that is
20 an ongoing and developing situations. We can even say,
21 as of today's date, with new elections coming up in the
22 Ukraine very shortly, that is even more uncertain than
23 usual, and who knows what it will be like in 2017.

24 We may be the best of friends, we may be the
25 worst of friends, but certainly that, to me, is more

1 serious than whether or not you have to or try to, A,
2 obtain further contracts, B, obtain the waiver that you
3 need to do it, because you are doing it now. So, yes,
4 technically, you might be violative of the statute, but
5 as a practical matter, that means that you have to go do
6 what you're doing right now.

7 The international issues and the national
8 security, perhaps a bigger issue, and the override
9 statement that I think bears on that is the one that
10 says, "As stated in the 2010 Authorization Act, it is
11 essential to have ISS human transportation capability,
12 specifically the United States capability, as soon as
13 possible. As further stated in the Authorization Act,
14 Section 201(b), the United States shall maintain an
15 uninterrupted capability for human space flight and
16 operation in lower earth orbit and beyond as an
17 essential instrument of national security and of the
18 capacity to ensure continued United States participation
19 in and leadership in the exploration and utilization of
20 space." That seems more pressing to me in terms of
21 urgency than whether or not you've technically violated
22 the statute and need to get another waiver.

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]
2 [REDACTED] [REDACTED]
3 [REDACTED], and that is, to me, a very deliberate
4 statement. There are several deliberate statements by
5 parties in this case that I think bear very heavily on
6 what we're doing, and that's one of them.

7 The other one, which we will get to when we talk
8 about reasonable alternatives -- and we can talk about
9 it now, actually -- or cost is the one where the
10 Government said that they will make the Protestor whole,
11 not just bid preparation costs, because I specifically
12 asked that question at the earlier hearing, but, in
13 fact, if, in fact, GAO overturns the award, that there
14 will be a competition, and if Sierra Nevada were to gain
15 a position at the table through that competition, then
16 they will be caught up, so to speak, on the costs spent
17 during the override period.

18 That reduces the potential harm dramatically to
19 Sierra Nevada. Those two statements, the Boeing
20 statement and the Government's statement, I think weigh
21 heavily in what we're talking about today as to the
22 validity of the override decision. I understand why the
23 Protestor, Sierra Nevada, feels a sense of urgency, but
24 at the same time, if they were to win a protest at the
25 GAO or if, later on, it comes to this Court, there is a

1 promise here to catch them up, and that's a pretty
2 significant representation by the Government.

3 Let's talk about consideration of reasonable
4 alternatives. There is certainly no incumbent
5 contractor sitting there who can be offered a bridge
6 contract. That is not the situation with the Russians.
7 That's very different and not a good alternative.

8 Defendant claims that NASA considered other
9 alternatives but concluded that it had none. I haven't
10 heard here, during the very expedited proceedings that
11 we've had, anybody offer an alternative, and even the
12 Protestor conceded that it was not ideal to continue to
13 use the Russians to reach the space vehicle.

14 It's not a question of whether it's critical to
15 meet a congressional mandate. It's a question of
16 whether it's critical to national security, to
17 protection of our astronauts. I'm not suggesting you
18 all go out there and violate statutory obligations, but
19 this one is in a slightly different context, I think.

20 The cost considerations, NASA has represented --
21 and, again, I don't really have numbers here to work
22 with, and I don't have any point/counterpoint. There
23 have been suggestions that the Protestor has made that
24 really these numbers are understated when we talk about
25 some of the costs back and forth, but it's not solid

1 numbers that I have to really assess that.

2 NASA has represented that they considered the
3 potential costs of terminating the contracts if the
4 protest were to be sustained and that they've considered
5 what the various data points are for how much money's
6 been obligated, what is potentially at risk here, and
7 that these contracts are coming in sort of capsules, the
8 money is coming in capsules, and represented that it's
9 the \$129.3 million on each contract that's the current
10 capsule that would be at risk.

11 Frankly, the number part of it, I almost have to
12 take the Government representation unless controverted,
13 and I'm not seeing the controverting except in very
14 general terms. Now, that may be a hazard of this kind
15 of expedited procedure, but once you say to Sierra
16 Nevada that we'll keep you whole, again, the cost
17 considerations -- you know, that's up to the Government.
18 If they want to -- it's kind of like if the Government
19 wants to spend its money doing that, then that's their
20 choice, and they've probably balanced this all out.

21 The Protestor very clearly states that "The NASA
22 facts -- the facts on which NASA relies" -- and I'm
23 quoting -- "for the cost consideration sections of its
24 override memorandum are either wrong or so incomplete as
25 to be misleading," and claims that NASA would be

1 underestimating its termination cost liability.

2 The costs also have to be compared, as suggested
3 by some, with what happens if there is no American
4 capability and the contract with the Russians has to be
5 renegotiated. That cost per seat of \$76.3 million is
6 pretty big. I don't know how many seats we would want,
7 but, again, that's part of why it's hard to calculate
8 the numbers here. But there also you have got the
9 problem of having to negotiate three years in advance,
10 and 2017 is about three years or less than three years
11 away.

12 The impact on competition and the integrity of
13 the procurement system, any time there's an override,
14 there is an impact on one side. That's a given.
15 Keeping the Protestor whole in this situation seems to
16 do a great deal towards keeping this Protestor in the
17 competition. The first step, obviously, is the GAO
18 decision, but that will allow the Protestor to catch up,
19 so to speak.

20 There is an intangible, and I recognize that the
21 Protestor raised it, saying, you know, then Boeing and
22 SpaceX will then have an advantage, because they will
23 know more about the contract. Particularly after that
24 certification review date, there's going to be an
25 exchange of information. I would and I have to believe

1 that if Sierra Nevada were to gain a seat at the table
2 at somebody's expense, whoever, if that were to happen,
3 the agency's best interest is to catch up Sierra Nevada
4 pretty darn quick to an information stability level that
5 allows them to perform.

6 So, again, yes, there probably will be some
7 information exchanged; at the same time, number one,
8 from a financial perspective, they will theoretically be
9 kept whole, according to the agency, and from an
10 information perspective, certainly if they were to get
11 the contract, they will. And it really will depend on
12 how the agency were to recompete as to whether there is
13 an information advantage, but that's not my issue now.

14 So, if the agency decides to simply evaluate
15 based on the proposals that they have now -- and I'm not
16 telling you how to do this, this is not in the form of a
17 declaratory anything -- but if the agency were to simply
18 reevaluate the proposals that are in, then nobody has an
19 advantage. If the agency decides to recompete with
20 either negotiation or updated proposals, then I think
21 you do have a challenge at the agency level to make sure
22 that it's an equal playing field.

23 But that's on the agency's head at that time.
24 It's so far down the road from what we're doing here
25 today that it's not something I should be considering,

1 and that would be the subject, potentially, of another
2 protest. I'm sure this is not over. These contracts
3 are for too much money, too important, too interesting,
4 and basically the core of what each of the companies
5 involved does. So, you know, this is not over, but
6 that's not an issue for us today. It is a valid point,
7 potentially, but it's not an issue for today.

8 And let me just read into the record the
9 statement made by the Government with respect to the
10 statement about making Sierra Nevada whole. Government
11 counsel unconditionally stated that "If Sierra Nevada
12 wins the award, they will start from ground zero and
13 they will get to do everything that SpaceX and Boeing
14 are doing right now, no difference. They will get a
15 complete contract, and they will be able to meet their
16 milestones as required by the contract no differently.
17 That's going to be exactly the same. The only
18 difference is that they will be a few months later, and
19 it's -- you know, while there's been some statement and
20 speculation that they will have lost out on some
21 expertise and some knowledge, it's not clear to me that
22 that would be taken into account in any reevaluation. I
23 think presumably the same standards of review will be
24 used by the agency in any reevaluation. Ultimately, we
25 think there isn't going to be any harm, because they

1 will be made whole."

2 And I specifically asked the question, "Are you
3 dealing with bid preparation costs?" And government
4 counsel specifically said no to that question.

5 Given the statements by government counsel, the
6 relative advantage seems to be more minimized actually
7 than in many other situations. Is it zero? Of course
8 not, but the Government seems to have made a commitment
9 to catch Sierra Nevada up if, in fact, they get that
10 seat at the table.

11 The bottom line, I am not going to override --
12 not going to override the override -- I shouldn't say it
13 that way. Let's scratch that. Let's start at the
14 bottom line again.

15 Bottom line, this Court will not void the
16 override issued by NASA, and you all are back to your
17 GAO protest at this point, with the agency report due on
18 Monday. So, let's turn to the future, then.

19 You have a couple of choices here on behalf of
20 the Protestor, obviously. The Government is free to
21 proceed, Boeing is free to proceed with the Government,
22 SpaceX is free to proceed with the Government on the
23 contracts that have been issued.

24 Mr. O'Donnell, do you have any idea of what your
25 next steps are, just so we can talk logistics for a

1 moment?

2 MR. O'DONNELL: I don't, Your Honor.

3 THE COURT: Okay. Obviously, you have to talk to
4 your client.

5 MR. O'DONNELL: I do.

6 THE COURT: In the event that you proceed with
7 GAO, and whatever they do they do, then, of course, you
8 have to make some decisions. In the event that you
9 decide not to proceed with GAO but to file a substantive
10 merits bid protest here at the Court, just be sure that
11 you mark it as a related case so that we don't run
12 afoul, you know, of some mixup there. We've done a lot
13 of work already, and it doesn't make sense for one of my
14 colleagues to have to start all over.

15 And I think I indicated to you that I am doing a
16 proceeding out of town, but that is -- I could be
17 reached by tomorrow afternoon. I'll be on a plane for a
18 couple hours in the morning, and any time from tomorrow
19 afternoon, I am reachable. Even tomorrow morning
20 Mr. Matson is reachable in chambers, and we will jump on
21 it as quickly as we've jumped on this one and make sure
22 that you aren't penalized by any extra time.

23 The difference, of course, is we will have to
24 have an administrative record on the evaluation material
25 that we don't have now, because we haven't gotten any of

1 that, didn't need it for this proceeding, but I'm
2 assuming that would not be much of a problem, because
3 you have to file one at the GAO anyway, and I assume
4 you're preparing that for filing when?

5 MS. REILLEY: Monday.

6 THE COURT: Monday, too. That's what I would
7 have assumed.

8 All right. So, the administrative record, the
9 only thing that you -- if you decide to come here and
10 stop the GAO proceeding -- and I'm not telling you to do
11 that by any means. You do what you do. That's totally
12 your choice. We are here, ready to serve, but whatever
13 you do you do in the best interests of your client,
14 quite clearly.

15 What I would say to you is that you and
16 Mr. Herzfeld should jump very quickly on talking about
17 anything you need beyond the administrative record so
18 that by the time we -- that's at GAO, so any
19 supplementation to that record. I'm assuming we will
20 have the same Intervenors, so you might as well start
21 talking to them and make sure that -- that that does not
22 become a problem eating up time, because that would be,
23 I think, inexcusable. We should be able to figure that
24 one out very quickly.

25 And then we would set, again, a very, very quick

1 briefing schedule. My intention would be to eat up as
2 few of the remaining 75 days as humanly possible,
3 understanding that obviously each day does matter to the
4 Protestor, even if it is, when you take all the facts
5 and balance it all out, I think appropriate to sustain
6 the override.

7 Any questions, Mr. O'Donnell?

8 MR. O'DONNELL: No, Your Honor. Thank you.

9 THE COURT: Very good.

10 Mr. Herzfeld?

11 MR. HERZFELD: No, Your Honor.

12 THE COURT: Boeing?

13 MR. MCCALEB: Just I'm sure all counsel agree
14 that we appreciate the Court's and the entire chambers'
15 devotion of time over the weekend to this matter. I
16 know it was inopportune, but thank you.

17 THE COURT: It was no different than what you had
18 to do, right?

19 MR. MCCALEB: That's true.

20 THE COURT: SpaceX?

21 MR. VACURA: We would echo that. We appreciate
22 the Court's diligence in responding. We have nothing
23 further. Thank you, Your Honor.

24 THE COURT: Mr. O'Donnell, anything?

25 MR. O'DONNELL: Nothing, Your Honor.

1 THE COURT: Very good, thank you. And I
2 appreciate, in return, the expedited briefing that you
3 all did, the working, you know, that we all had to do to
4 get ready for the first hearing and then get ready for
5 today. So, I thank you all. It's been a very pleasant
6 and easy process.

7 There is a couple -- two last questions,
8 actually, one that I think we probably ought to -- which
9 I didn't -- I was eager to jump right into it, so I did
10 not get counsel to represent who they were, and we'll
11 put that into the record.

12 Mr. O'Donnell?

13 MR. O'DONNELL: Neil O'Donnell, Rogers Joseph
14 O'Donnell, for Plaintiff Sierra Nevada Corporation.

15 THE COURT: And Mr. Metzger?

16 MR. METZGER: Bob Metzger, Rogers Joseph
17 O'Donnell, also for Plaintiff Sierra Nevada Corporation.

18 THE COURT: And definitely, Mr. Metzger, I thank
19 you for your presentation at the first hearing. It was
20 very helpful, because that really got us all into the
21 case.

22 MR. METZGER: Thank you very much, Your Honor.

23 MR. HERZFELD: Your Honor, Dan Herzfeld for the
24 United States Department of Justice. With me, my
25 colleagues, Karen Reilley, Scott Barber from NASA, and

1 my colleague from the Department of Justice, Kirk
2 Manhardt, and again, today, Mr. William Gerstenmaier,
3 Associate Administrator for Human Exploration Operations
4 Directorate from NASA.

5 THE COURT: All right. And Mr. McCaleb?

6 MR. MCCALEB: Yes, Scott McCaleb from Wiley Rein
7 on behalf of Boeing. With me, Jon Burd from our firm,
8 as well as Gary Ward and Samantha Lee. Also with me are
9 three in-house counsel from Boeing who are admitted to
10 the protective order at GAO, Suzette Derrevere, Patrick
11 Fennelly, and Steven Cowan.

12 THE COURT: Mr. Vacura?

13 MR. VACURA: Your Honor, Rick Vacura from
14 Morrison Foerster --

15 THE COURT: I mispronounced it. I apologize.

16 MR. VACURA: That's okay, that happens a lot. I
17 answer to anything. No problem, Your Honor.

18 -- for Space Exploration Technologies Corporation
19 from Morrison Foerster, and with me are my colleagues
20 from Morrison Foerster, Steven Cave and Catherine
21 Chapple.

22 THE COURT: Okay, thank you.

23 All right. Finally, we obviously have given this
24 to you orally because we did not have a finished written
25 opinion. The question is whether you all want a written

1 opinion, think it's necessary, or on this fast-moving
2 track, whether the transcript of today's proceeding is
3 sufficient for you.

4 Mr. O'Donnell?

5 MR. O'DONNELL: Your Honor, tentatively, I think
6 we do want a written opinion. If, after consultation
7 with my client, we conclude otherwise, I will let you
8 know.

9 THE COURT: Well, then, you are going to have to
10 tell us quickly so we can get it out quickly.

11 MR. O'DONNELL: I understand.

12 THE COURT: All right. Mr. Herzfeld, what's your
13 thought?

14 MR. HERZFELD: Your Honor, we -- you know, it's
15 up to the Court. We do not need one.

16 THE COURT: All right.

17 Mr. McCaleb?

18 MR. MCCALEB: We echo that. We do not need a
19 written opinion.

20 MR. VACURA: We agree, Your Honor.

21 THE COURT: Okay. So, Mr. O'Donnell, I guess
22 it's in your court.

23 MR. O'DONNELL: Thank you, Your Honor, and I will
24 make every effort to let you know.

25 THE COURT: And honestly, you know, it probably

1 should be balanced by what you decide to do.

2 MR. O'DONNELL: That's correct, Your Honor.

3 THE COURT: There is only one of me and only one
4 of Mr. Matson, so it will impact the schedule,
5 obviously.

6 MR. O'DONNELL: I understand, Your Honor. Thank
7 you.

8 THE COURT: All right, very good. Thank you. We
9 stand adjourned.

10 (Whereupon, at 3:34 p.m., the proceedings were
11 concluded.)

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1 CERTIFICATE OF TRANSCRIBER

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4 I, Susanne Bergling, court-approved transcriber,
5 certify that the foregoing is a correct transcription
6 from the official digital sound recording of the
7 proceedings in the above-titled matter.

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12 DATED: 10/22/2014 s/Susanne Bergling

13 SUSANNE BERGLING, RMR-CRR-CLR

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